United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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Court of Appeals, District of Columbia

OCTOBER TERM, 1910.

No. 2242.

791

JULIA A. EWING, APPELLANT,

vs.

PLIMPTON B. CHASE

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED OCTOBER 29, 1910.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

OCTOBER TERM, 1910.

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JULIA A. EWING, APPELLANT,

vs.

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In the Court of Appeals of the District of Columbia.

No. 2242.

JULIA A. EWING, Appellant,
vs.
PLIMPTON B. CHASE.

a Supreme Court of the District of Columbia.

At Law. No. 48615.

JULIA A. EWING, Plaintiff,
vs.
PLIMPTON B. CHASE, Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed, and proceedings had, in the above-entitled cause to wit:

1 In the Supreme Court of the District of Columbia.

At Law. No. 48615.

JULIA A. EWING, Plaintiff,
vs.
PLIMPTON B. CHASE, Defendant.

Memorandum.

June 22, 1906.—Original Declaration filed.

Plea to Declaration.

Filed August 22, 1906.

* * * * * * *

The defendant, Plimpton B. Chase, for plea to the declaration filed in the above entitled cause, says that he is not guilty in manner and form as therein alleged.

WILTON J. LAMBERT,
Attorney for Defendant.

Replication.

Filed September 4, 1906.

* * * * * * *

Julia A. Ewing, the plaintiff in the above entitled cause,
2 joins issue upon the plea of the defendant Plimpton B. Chase filed therein.

R. ROSS PERRY & SON,
Attorneys for Plaintiff.

Supreme Court of the District of Columbia.

FRIDAY, *July 19th,* 1907.

Session resumed pursuant to adjournment, Hon. Thos. H. Anderson, Justice presiding.

* * * * * * *

Upon motion of plaintiff's attorney and consent of defendant's attorney, leave is hereby granted plaintiff to forthwith file an amended declaration herein, and the plea to the original declaration is ordered to stand as to said amended declaration.

Amended Declaration.

Filed July 19, 1907.

* * * * * * *

The plaintiff, Julia A. Ewing, sues the defendant, Plimpton B. Chase, for that heretofore, to wit, on the 29th day of January, A. D. 1906, at the City of Washington, District of Columbia, the defendant was the lessee and in control and possession of certain
3 premises situate in the said City and District, known as Chase's Theatre, upon which premises the said defendant then and there conducted a public entertainment or theatre and charged prices of admission to all persons entering the said premises for the purpose of witnessing the said entertainment; and the said defendant produced on said premises afternoon and evening theatrical performances known as polite vaudeville entertainments for which entrance fees were by him charged of persons desiring to witness the said performances; and the said plaintiff on the afternoon of the day and year above mentioned desiring to witness said performance for that afternoon had purchased for her of the defendant a ticket entitling her to admission on that afternoon to the said premises and to a seat in a lower box on the right hand side of the said theatre, and the said plaintiff was at the time aforesaid duly admitted by the defendant upon presentation of said ticket to the said theatre and box; that it then and there became and was the duty

of the said defendant to so construct and maintain the said premises and especially the aisles and passage ways of said theatre that they would be in a reasonably safe and proper condition for persons properly on said premises and desiring to enter and leave the said premises and the aforesaid box during the said entertainment and at the conclusion thereof and also to keep the same properly lighted until such persons had a reasonable opportunity to leave the said box and premises at the conclusion of the said entertainment; but the plaintiff avers that on the occasion in question the defendant unmindful of his duty in the premises negligently suffered and permitted the said right hand aisle of said theatre leading from and beyond the entrance to said box, a seat in which the plaintiff
4 occupied, to the exit from said theatre, to be in a dangerous and unsafe condition in this: that the usual and necessary entrance to said box was by a passage way leading thereto from the right hand aisle of the ground floor of said theatre; that the said passage way was separated from the said aisle by a curtain hung at the entrance to said passage way from said aisle, which could be drawn aside at either end so as to allow persons access to said passage way from said aisle and to said aisle from said passage way; that there was then and there a descending step in said aisle which extended entirely across said aisle of the height of to wit, six inches, and that the said step was constructed across the said aisle just beyond the point of exit on said aisle from said passage way from said box and at a short distance, to wit, four inches, from said point of exit and extended as aforesaid across the aforesaid aisle; that the existence and location of said step aforesaid at the place aforesaid in said aisle constituted and was a dangerous construction and a trap both in its construction, itself, and also in this: that unless the premises aforesaid at the location of the said step were clearly lighted, a person passing along the said aisle and turning to enter the said passage way and passing along said passage way and turning to enter the said aisle could not see the said step; that the said premises were so constructed and maintained that daylight was excluded therefrom and the same were lighted with artificial lights which could be and were by the servants of the defendant turned on and off, lowered or heightened by mechanical appliances as occasion should re-
5 quire; and the plaintiff avers that on the occasion in question the defendant unmindful of his duty in the premises negligently suffered and permitted the said right hand aisle of said theatre leading from and beyond the said box, a seat in which the plaintiff occupied, to the exit from said theatre, to be in a dangerous and unsafe condition in that there was then and there in the said aisle the aforesaid step and also in that the said defendant after the close of the said performance and before the plaintiff had reasonable time to leave the said theatre, negligently suffered and permitted the above mentioned artificial lights which were necessary to a reasonable and proper lighting of the said premises to be turned down and extinguished and thereby caused the said premises to be and remain in a dark and improperly lighted condition; and further negligently permitted the said curtain to remain over the entrance to

said passage way from said aisle; by reason of all whereof the said plaintiff while using due care and caution on her own part, in leaving the said box and going along the passage way on the said occasion in order to depart from the said theatre could not and did not see the said step immediately after leaving said passage way and was precipitated and thrown violently down the said step, extending across the said aisle, to the floor of said theatre, while drawing the said curtain aside in order to allow a companion free access to said aisle from said passage way, and her body was much cut, bruised, and wounded; and she then and there suffered an impacted fracture of the left femur and in consequence thereof her power of
6 locomotion and nervous system are and will be permanently impaired, and her left leg is and will be permanently shortened; and the plaintiff was otherwise permanently injured both externally and internally, and became and was and still is sick, sore, and lame, and has endured and will continue to endure great pain, and bodily anguish; and has been and will continue to be by reason of said injuries hindered and prevented from performing and transacting her necessary affairs and business: and further the said plaintiff was forced and obliged to pay out a large sum of money, to wit, the sum of Two thousand Dollars ($2,000.) in and about endeavoring to be cured of the injuries aforesaid and in extra expenses of maintenance rendered necessary by reason thereof and will in the future be obliged to pay out large sums of money for the same purposes; to the damage of the plaintiff of Fifteen thousand Dollars ($15,000.). Wherefore the plaintiff claims of the defendant the sum of Fifteen thousand Dollars ($15,000.) and the costs of this suit.

R. ROSS PERRY & SON,
Attorneys for Plaintiff.

(Endorsed:) I consent to the filing of within Declaration & Plea to stand as to original. W. J. Lambert, Att'y for Def't.

7 *Memorandum.*

June 2, 1910.—Verdict for Defendant.

Supreme Court of the District of Columbia.

THURSDAY, *June* 16, 1910.

Session resumed pursuant to adjournment, Mr. Justice Wright presiding.

* * * * * * *

Upon hearing the plaintiff's motion for a new trial, it is considered that the same be, and hereby is overruled, and judgment on verdict ordered.

Therefore it is considered that the plaintiff take nothing by her suit, and that the defendant go thereof without day, and recover against the plaintiff the costs of his defense, to be taxed by the Clerk, and have execution thereof.

Order for Appeal.

Filed June 20, 1910.

* * * * * * *

The Clerk of said Court will enter an appeal to the Court of Appeals from the judgment in the above entitled cause & issue a citation to the defendant.

H. W. SOHON,
Attorney for Plaintiff.

8 In the Supreme Court of the District of Columbia.

At Law. No. 48615.

JULIA A. EWING
vs.
PLIMPTON B. CHASE.

The President of the United States to Plimpton B. Chase, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the cause therein, under and as directed by the Rules of said Court, pursuant to an Appeal entered in the Supreme Court of the District of Columbia, on the 20th day of June, 1910, wherein Julia A. Ewing is Appellant, and you are Appellee, to show cause, if any there be, why the Judgment rendered against the said Appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Harry M. Clabaugh, Chief Justice of the Supreme Court of the District of Columbia, this 20th day of June in the year of our Lord one thousand nine hundred and ten.

[Seal Supreme Court of the District of Columbia.]

J. R. YOUNG, *Clerk,*
By H. BINGHAM,
Ass't Clerk.

Service of the above Citation accepted this 25th day of June, 1910.

WILTON J. LAMBERT,
Attorney for Appellee.

[Endorsed:] No. 48615, Law. Ewing vs. Chase. Citation. Issued June 20, 1910. Served cop- of the within Citation on ——. ——, Marshal. H. W. Sohon, Attorney for Appellant.

9 *Memoranda.*

June 30, 1910.—Bond for costs fixed at $100. with leave to deposit $50. in lieu thereof.

July 6, 1910.—$50. deposited in lieu of appeal bond.

July 22, 1910.—Bill of Exceptions submitted.

Supreme Court of the District of Columbia.

FRIDAY, *October* 14, 1910.

Session resumed pursuant to adjournment, Mr. Justice Anderson presiding.

* * * * * * *

By Justice Wright.

The Court having this day signed the bill of exceptions of the plaintiff heretofore submitted herein, now orders the same of record as of the time of the noting thereof at the trial.

10 *Bill of Exceptions.*

Filed October 14, 1910.

* * * * * * *

Be it remembered that on the 26th day of May, 1910, before the Honorable Mr. Justice Wright of said Court and a jury regularly impaneled, the above entitled cause came up for trial on the issue joined.

The plaintiff, to maintain the issue on her part, offered to prove that at the time of the injury complained of the defendant was the lessee and proprietor of a theater in the City of Washington, D. C., known as Chase's Theater, and the terms of his lease; and thereupon the defendant admitted that if there was any negligence in construction or operation of said theater he is liable.

The plaintiff then offered evidence tending to prove that on the 29th day of January, 1906, she had purchased for her from the defendant a ticket entitling her during a performance on the afternoon of that day to a seat in a lower box on the right-hand side of said theater; and the plaintiff was duly admitted upon presentation of said ticket to the said theater and box; that the usual

11 and necessary entrance to and from said box was by a passageway leading thereto from the right-hand aisle of said theater; that a curtain was hung at the entrance of said passageway from said aisle, which curtain could be drawn aside at either end so as to allow persons access to said passageway from said aisle and to said aisle from said passageway; that said aisle extended from said entrance to said passageway to the exit of said theater, and also in the opposite direction, from said entrance to said passageway toward the orchestra of said theater; that said aisle was an inclined plane from points about eight feet either side of said entrance to said passageway, and a step of about six inches descent extended entirely across said aisle about six or eight inches beyond the entrance to said passageway; that persons going to or coming from said box by way of said aisle would not cross said step, but would cross it if they passed the entrance to said passageway and proceeded down said aisle toward the orchestra; that the plaintiff had

gone to and from said box many times, but had never gone down said aisle beyond said passageway, and had never noticed said step; and that said theater was so constructed that daylight was excluded therefrom, and it was lighted by electric lights, all or parts of which could be and were by the servants of the defendant turned on or off by mechanical appliances as occasion should require.

The plaintiff also offered evidence tending to prove that after the close of said performance she proceeded to leave the theater, and passed through said passageway, and descended two steps which were therein, and reached said aisle walking forward, and then turned around and caught hold of said curtain to draw it
12 aside for a lady companion whom she expected to follow her; that when she got down the steps of the passageway and turned around to draw said curtain the lights in the auditorium, except the single lights around the side indicating fire-escapes, one at head of said inclined aisle and one in side passageway, were turned down or extinguished, thereby causing the said theater to be in a dark and insufficiently lighted condition; that she could not see said step in said aisle, and took one step in the aisle from in front of the passageway to hold the curtain back, and was precipitated and thrown violently down the said step, and that after she had fallen the lights were relit, or turned up after an usher had called to a man in the flies to turn them up.

On cross examination plaintiff testified that she had a standing invitation from Mrs. Gould to occupy that same box throughout the season, and that prior to the accident on this occasion she had been in that box in the theater a great many times, and had left it many times when the theater was all lighted up; she had not seen the little step in the aisle near the passageway to the box before her accident, and could not say that she saw it after she fell, but she knew it was there because she fell, and she could not say that she had ever seen that step; when she drew the curtains back to see if Mrs. Gould was coming out, she was facing the curtains. The lights in the center of the house were turned off and as she fell there were lights around the entrance hall; there was a dim light that shone in front of the box she had occupied. Immediately after the close of the performance the lights all over the house
13 were turned on, and there were plenty of them; the lights were on when she came down the three steps, but were very soon turned off; the lights were turned off after she got down the three steps and took hold of the curtain, just at the moment she fell; she could not say that the lights were turned on when she took hold of the curtain, but she thought if the lights were on she might have seen that step or she might not have seen it, because she did not think of being near a step.

In rebuttal plaintiff denied that she said the accident was her fault or that she ought to have been watching where she was going.

Plaintiff then read the deposition of Mrs. ELIZABETH TENBROECK GOULD who testified that she was present in the box with plaintiff on the occasion of the accident; plaintiff had preceded her out of the box a few moments and witness did not know she was gone

until she heard a crash which was plaintiff's fall; she did not see her fall; witness cried out, "Miss Ewing, where are you?" and went out into the aisle and found Miss Ewing lying in the aisle between the passage doorway and the orchestra. When witness went out into the aisle she should say the lights were not as brilliant as during the performance but were brighter than when the vitagraph pictures were being shown; when she got out into the aisle a young man was coming towards Miss Ewing and called out to some one in the flies, "Turn up the lights—there will be another day;" witness did not know whether any change was made in the lights when that was called out—she was so crazed and wild because Miss Ewing was hurt. There was a small step in the aisle six or eight inches beyond the doorway to the passageway towards the
14 orchestra. Witness had fallen over it and seen it and knew others who had fallen over it, but had never called such occurrence to the attention of the management.

Plaintiff also read the deposition of Mrs. KATHERINE M. GUYN, who testified that she was present and saw the accident to plaintiff. It was after the vitagraph pictures were shown, people were leaving the theatre and she was standing in the bend of the aisle about six feet from the doorway to the passage putting a cap on a child who was with her. There was a small step in the aisle about six inches beyond the doorway toward the orchestra. When Miss Ewing came out of the passage the lights were suddenly extinguished or snapped off and it became very dark; witness looked up and saw Miss Ewing falling; she could distinguish her figure; someone called, "Turn up those lights;" they were turned up and she then went with others to Miss Ewing's assistance.

R. ROSS PERRY, JR., was called as a witness for the plaintiff and testified that he had been attorney for the plaintiff but had withdrawn from the case because it appeared that his testimony was important. That several weeks after the accident to plaintiff he visited Chase's Theatre twice for the express purpose of examining the location and condition of the aisle in which plaintiff fell so as to be able to describe the same correctly in the declaration, and that there was a step in the aisle leading to the passageway to the boxes on the south side of the Theatre about six inches beyond the doorway of the passage and the floor was carpeted.

A. M. LAWSON testified for the plaintiff that he was one of the Building Inspectors of the District and it was his duty to
15 inspect theatres at the time of the accident and for four or five years prior thereto; that until the summer of 1906 there was a step in the inclined aisle on the south side of Chase's Theatre about twelve inches beyond the entrance to the passageway leading to the boxes; the step was between said entrance and the orchestra; there was a similar step in the similar aisle on the north side of the Theatre; and in the summer before the accident to the plaintiff the witness was standing with Mr. Chase at the similar step in the north aisle of the Theatre and called his attention to the dan-

gerous character of that step and illustrated to him how easily persons coming out of the passageway to the boxes might fall over the step and that the defendant replied that it had been there since the Theatre was built and he had no idea the District authorities had a right to have it changed.

The plaintiff then proved and offered in evidence the regulations for the public safety in theatres and other public places of amusement and assembly in the District of Columbia adopted by the Commissioners of the District of Columbia April 27, 1902, in accordance with the requirements of the Joint Resolution of Congress approved February 26, 1892, entitled, "Joint Resolution to regulate licenses to proprietors of theatres in the District of Columbia, and for other purposes," which regulations are as follows:

16 *Theaters and Other Places of Public Assembly.*

Regulations for the Public Safety in Theaters and Other Public Places of Amusement and Assembly in the District of Columbia.

SEC. 173. The following regulations are hereby prescribed for the public safety in theaters and other public places of amusement and assembly in the District of Columbia, in accordance with the requirements of the first section of the joint resolution of Congress, approved February 26, 1892, entitled "Joint resolution to regulate licenses to proprietors of theaters in the District of Columbia, and for other purposes:"

Exits, Stairways, and Fire-Escapes.

SEC. 174. All exits shall be of such dimensions as may be deemed sufficient by the Inspector of Buildings and the Commissioners of the District of Columbia. In theaters every floor that is more than eight feet above the sidewalk shall be provided with ample stairways and such fire-escapes as may be required by the Inspector of Buildings and the Chief of the Fire Department.

Heating Apparatus.

SEC. 175. All heating boilers shall be placed outside of the walls of theaters, and their situation approved by the Inspector of Buildings and the Chief of the Fire Department.

No boiler, furnace, nor heating apparatus except steam pipes and radiators shall be located under the auditorium or stage, nor under any passage or stairway of exit.

17 Fire-Resisting Construction.

SEC. 176. Every building hereafter erected or altered to be used as a theater or public place of amusement involving the use of a stage with movable or shifting scenery, curtains, and machinery shall be

of brick and fire-resisting construction throughout, except the flooring boards and the portion of the stage floor fronting the auditorium, which may be constructed of wood. Such building shall have the highest part of the main auditorium floor not more than four feet above the sidewalk; shall have at least one frontage on the street or avenue, with openings for exits not less than one-third of the frontage of the building, and shall have the doors, halls, corridors, lobbies, stairways, passages, and aisles wide, direct, and so constructed and arranged as to afford easy egress under all circumstances.

Exits.

SEC. 177. All exits and entrances shall, as far as practicable, be identical, and shall have all doors open outward and of such width as may be deemed sufficient by the Commissioners of the District of Columbia.

SEC. 178. Such buildings shall have sufficient stairways of such width and location as may be deemed by said Commissioners sufficient for exit under a pressure from panic, fire, or other cause.

Aisles.

SEC. 179. The aisles next to the walls of the building shall
18 be not less than three feet wide. All other aisles shall be not less than three feet six inches wide at the end near the stage, and gradually increase in width toward the exit to a width of five feet six inches at the end next to exit without any projection into them.

Floors.

SEC. 180. All changes in the levels of the floors of such buildings, except under stairways, from story to story, and except the necessary steps in galleries and balconies rising toward the exits, shall be made by inclines of no steeper gradient than two in ten within the auditorium and rising toward the exits and one in ten for all others.

Stairways.

SEC. 181. All stairways shall be composed of iron, stone, or other incombustible materials. The risers shall not be more than seven and a half inches nor the treads less than ten and a half inches. No window shall be used in any stairway for entrance or exit. All stairways must be constructed with secure hand-rails or brick dividing walls sufficient in construction to prevent accident in case of a heavy pressure. There shall be two stairways from each floor of an auditorium, starting not less than five feet wide at the upper gallery and increasing one foot in width for each one hundred seats in the galleries below.

Partition Walls.

SEC. 182. All partitions inclosing lobbies and corridors or separating them from auditorium shall be of brick masonry or of other

non-combustible materials. Every approach to, or exit from,
19 a theater or other place of amusement through any other building shall have inclosing walls of brick, stone, or iron, and floors and ceilings of approved incombustible, fire-resisting materials, and there shall be no opening through said walls, floors, or ceilings.

Theater Lighting.

SEC. 183. All theaters shall be lighted by electric light only, and shall have at least three separate and distinct circuits: (*a*) for the stage, (*b*) and (*c*) for the auditorium, corridors, and exits. The circuits referred to in (*b*) and (*c*) shall be so arranged that half of the lights in each division of the auditorium and half of those in each corridor and exit shall be on (*b*) and the other half on (*c*) circuit. When the current is supplied by a public lighting company these circuits shall be taken separately from the street mains.

Under all circumstances complete metallic circuits must be employed. Gas and water pipes shall never form a part of any circuit.

The number of lamps shall be so subdivided that no subcircuit shall carry any more than 60 amperes, and each subcircuit shall start from a distributing board.

Exit Lighting.

The red lights over exits in auditorium and all lights in passages and stairways shall be independent of the lights in other parts of the house, and so arranged that they cannot be turned off from the stage or platform.

Lobbies.

SEC. 184. There shall be lobbies adjoining each division
20 of the auditorium, the floor surfaces of which shall be equal to one-third of the seating space of the adjacent auditorium.

Walls to Separate Stage and Auditorium.

SEC. 185. The stage shall be separated from the auditorium by a brick wall and not less than seventeen inches thick, or its equivalent, the entire width of the building and topped out at least four feet above the roof over the auditorium. There shall be no openings in this wall except the curtain opening, and not more than two others, to be located at the level or below the stage. These latter openings shall not exceed twenty-one superficial feet each, with tinned wood and self-closing doors securely hung to rebates in the brickwork. The wall over the curtain opening shall be carried by iron girders or by a brick arch of sufficient capacity and secured at each side of opening to prevent motion by thrust of arch.

Protection from Fire.

SEC. 186. There shall be water plugs on each side of stage and fly floors, with sufficient hose attached to each plug of the size used by the Fire Department to reach any point on or above the stage. They must be kept free from obstruction and ready for use at any moment.

There shall be placed over the curtain opening the full width a two-inch perforated pipe, supplied at each end by a one and a half inch rising main, with valves controlled from stage, to form when in service a water curtain or automatic sprinkler, as the said Commissioners may direct.

21 SEC. 187. The curtain opening shall be fitted its full size with an asbestos or other fireproof curtain, hung and fitted with appliances to be lowered without delay. The finish or decorative features around the curtain opening shall be of incombustible materials well secured to masonry.

SEC. 188. The roof trusses, all scenery, curtains, and exposed woodwork of all stages and fly floors shall be thoroughly covered or saturated, if practicable, with fire-resisting materials, approved by the Commissioners of the District of Columbia.

SEC. 189. All carpenter or property shops and wardrobes shall be separated from the stage, auditorium, and dressing-room divisions by solid brick walls not less than thirteen inches thick, with no openings to auditorium or dressing-room divisions. All openings to stage shall have tinned-wood self-closing doors, securely hung in rebates in the brickwork.

SEC. 190. All rooms and premises in every theater for the use of employés shall be located in secure positions, and shall have at least two independent exits as remote from the stage as practicable. All parts of such rooms and premises, with their passages and stairways, shall be of fire-resisting materials.

Ventilators.

SEC. 191. There shall be one or more ventilators near the center and above the highest portion of stage of every theater, constructed of incombustible materials and equal in combined area of

22 opening to one-tenth of the area of the stage floor. Said ventilators shall have valves or louvres so counterbalanced as to open automatically, and shall be kept closed when not in use by cords or wires reaching to the prompter's desk and readily operated therefrom. There shall also be a proper arrangement of combustible cords or fusible connections to open the ventilating valves automatically by the action of fire on the stage.

Assembly Halls.

SEC. 192. Permits for the erection of buildings to be used wholly or partly as assembly halls will not be issued until the plans for ventilation and protection from fire have been approved by the Inspector of Buildings. The number, size, and location of the exits must be approved by the Inspector of Buildings and the Commissioners of the District of Columbia.

Existing buildings shall not be altered for use as halls for public assembly except in accordance with these regulations.

Construction of Galleries.

SEC. 193. When galleries are constructed, all pillars, joists, and beams used in the construction of the same must be of iron or steel.

Exit Signs and Red Lights.

SEC. 194. Each and every exit of a theater or other public place of amusement which can be used in case of fire shall be designated by the word "Exit" in letters of such size that they can be read
23 from the opposite side of the auditorium, and so situated immediately over or on the exits that they can be readily seen from any or all parts of said auditorium or gallery. A red light shall be placed over each of said signs and kept burning during the time of the entertainment or performance, and no other fixed red lights will be permitted in the auditorium, and the fact that such red lights indicate an exit to be used in case of fire shall be conspicuously printed on the programme used in the theater or other public place of amusement at each entertainment.

Penalties.

SEC. 195. Any person or persons, whether as principal, agent, or employé, violating any of the provisions of these regulations or any amendment thereof for the violation of which no other penalty is prescribed shall, on conviction thereof in the Police Court, be punished by a fine of not less than one dollar nor more than one hundred dollars for each such violation and a like fine for each day during which such violation has continued or may continue, to be recovered as other fines and penalties are recovered.

The defendant objected to said offer on the ground that said theater was erected before the adoption of said regulations and that the regulation applied to newly constructed or altered buildings since the enactment of the regulations. The plaintiff admitted that the regulations were adopted after the erection of the theater. The Court sustained said objection, to which ruling of the Court the plaintiff then and there excepted.

The plaintiff further proved that she was 70 years of age, and that by reason of said fall she suffered an impacted fracture of the neck of the left femur, and in consequence thereof her powers of
24 locomotion and nervous system were permanently impaired, and her left leg was permanently shortened, and that she had expended $1625 and other sums for the services of a surgeon and physicians and other expenses made necessary by her injury.

The plaintiff thereupon rested and the defendant took the stand in his own behalf and testified that he had been running his theater since 1899; during the 11½ years that he has had the theater he has, with a few exceptions, witnessed the afternoon performance on Monday, together with his manager, Miss H. Winifred De Witt; but was not in the auditorium when the plaintiff was injured. In 1906 after plaintiff's accident all the steps on the first floor of the theatre

in the aisle were removed; between 1899 and 1906, no changes whatever were made with reference to the steps; there was never any step in the aisle at or near the entrance of the box as testified to by the plaintiff; there was a step on a line with the railing around the front of the orchestra circle, and a step on a line with the last row of seats of the orchestra circle, but none between these two. There were, at the time of the accident to the plaintiff, 17 lamps within fifteen feet of the spot where she was injured; there were 97 lamps at an approximate farthest distance of 60 feet; there were more than 50 others that did not shine direct upon the spot where plaintiff fell, but that illuminated the house. There were 97 without an obstruction shining upon that spot. It is the custom at the theater, after the vitagraph pictures are over, to turn up all the lights, first, to
25 enable the people to go out, and after that, to clean the theater after the matinee. He never had any conversation with Mr. Lawson about any steps in the theater, nor does he remember of ever having seen Mr. Lawson backing off of one of the steps to show that it was dangerous. The steps on the first floor were eliminated in 1906 in connection with general improvements being made at the theater at the time; this was done to improve the house and prevent stumbling; neither Mr. Lawson nor Mr. Ashford called upon him to remove any steps. After the performance on the day plaintiff was injured, the Prince of Pilsen Girls commenced their rehearsal; there are no dark scenes in that act, and the house had to be well lighted, in order that the orchestra could play.

To further maintain the issue on his behalf joined, defendant offered as a witness MARSHALL MILLER, who testified that during the two seasons, 1905 and 1907, he was usher at Chase's Theater and had charge of the four boxes on the south side of the theater, part of the orchestra and the whole orchestra Circle from the center aisle; he was standing on the opposite side of the house at the front entrance, when Miss Ewing was injured, watching her and waiting for her to come out; saw her coming out of the passageway into the aisle facing towards the house; was doing this because the employees were supposed to stay in the house until everybody was out; there was nothing to obstruct his view of them; at the time the whole house was lighted; the lights were perfect; there was no step in the aisle near the box entrance as testified to by the plaintiff; in going around that particular aisle, when in a hurry, he would sometimes go so
26 fast that he would slide on the carpet, his shoes would get so slippery.

On cross-examination this witness testified that he had no recollection of any changes being made in the appearance of the theater, so far as steps in that aisle are concerned, from the south wall down into the orchestra since he had worked there.

Thereupon defendant offered as a witness WALTER BURNS who testified that he was in the center of the theater at the time of the accident to plaintiff; he was kneeling on a seat looking to the rear of the theater; his attention was attracted to the direction of the

plaintiff by the noise of the brass rings when she pulled the curtains; plaintiff was then looking towards the passageway; saw her as she pulled the curtains; she then fell.

Thereupon defendant offered as a witness JOSEPH H. BECKER, operator of the vitagraph; at the time of the accident he was standing in the center of the second balcony, rewinding his films after the matinee; after he had put on the picture, "Good Afternoon" the lights immediately went up; his attention was attracted by a lady coming out of a box, walking out backwards and stopping to talk to a friend who was hidden in the passageway that he could not see; he could only see her from her waist down; as she reached the bottom step, in stepping down the lady brought her right foot to the very bottom of the incline, leading to the box, when her ankle turned or something happened, and she fell. He ran to her assistance and asked her what he could do for her and she said, "No, this a mere trifle and it is my own fault. I ought to have been watching where I was going." Then the matron came. At the time of the
27 accident, every light in the theater was burning brightly; at the end of the performance they are all lighted and remained that way until the house is thoroughly cleaned and inspected, which would take an hour or an hour and a quarter or possibly an hour and a half. The custom at that time at afternoon performances is to turn the lights up. There was no step in the aisle near to the entrance of the box as testified to by the plaintiff; he has been over that aisle at least a thousand times.

Thereupon defendant further offered WALTER GRIFFITH who testified that he had charge of the cleaning of the theater at the time of the accident to plaintiff. Was in the theater at the time and saw the plaintiff just after she fell; plaintiff was rendered assistance and the matron asked plaintiff how she ever came to fall, and plaintiff replied, "It was all my fault." At the time every light was on full; the lights were on full until the cleaning was finished and were turned off after the cleaning was finished, which, on this occasion, was nearly seven o'clock. There was no step in the aisle near to the entrance of the box as testified to by plaintiff; there was a step directly at the end of the row of chairs at the end of the orchestra circle.

Thereupon the defendant offered evidence of a musician, the matron, carpenters, a detective, ushers and others tending to prove that there was no step in the aisle near the entrance to the passageway into the box at the time of the injury to the plaintiff; that at said time there were only two steps in said aisle, and they were eight feet in either direction from said entrance to said passageway,
28 and that said steps and the intervening section of said aisle were removed in 1906; that the lights in the theater were in no way put out or lowered at the time of the accident; that all the lights in the theater were lit; that defendant had a license from the District of Columbia to run said theater at the time of plaintiff's

accident and each year since 1899. Further, that the lights were never put out after a matinee performance until all the people were out of the theater; the orchestra plays until everybody is out, and that the lights are kept lit for more than an hour after the performance is over, because the cleaners go into the house immediately after the matinees so as to have the house ready for the opening of the evening performance.

Thereupon the plaintiff requested the Court to grant the following instructions to the jury:

I.

29 The jury are instructed as matter of law that if they find from the evidence that at the time of the injury to the plaintiff she was attending a theatrical performance on premises under the control and possession of the defendant, and that she fell over a step in an inclined side aisle on the ground floor of the said premises while leaving the said premises within a reasonable time after the close of the performance, and while drawing a curtain back at the exit of a passageway leading from a box to the said aisle, and while drawing said curtain the lights in said theater were lowered or partly extinguished so that the plaintiff did not see said step, and that her injury resulted from such maintenance and operation of said step, curtain and lights, and that such maintenance and operation of said step, curtain and lights on said occasion were under the circumstances of this case without that due care and prudence which should have been exercised by the defendant, then their verdict should be for the plaintiff unless they further find that the plaintiff was guilty of negligence proximately contributing to her injury.

II.

The jury are instructed as matter of law that the burden of proof is upon the defendant to show contributory negligence on the part of the plaintiff by a preponderance of the evidence.

III.

The jury are instructed as matter of law that if they find for the plaintiff they should award her such sum as will fairly and
30 fully compensate her for the physical injuries which she has sustained and the physical and mental pain and suffering resulting from and consequent upon such injury, and for the impairment of her bodily health and faculties; and they should further compensate her for the amount shown by the evidence to have been expended by her for medical and surgical attendance and nursing, and such other amount as the evidence shows she has expended in endeavoring to be cured of said injuries; and if the jury further find from the evidence that the injuries received by the plaintiff are permanent or reasonably certain to continue in the future, they should award her full and fair compensation for the same for the time during which such injuries are reasonably certain to continue.

IV.

The jury are instructed that they should decide the issue in this case upon the preponderance of the evidence. The preponderance of evidence does not depend upon the number of witnesses, and does not mean the greater number of witnesses, but it does depend upon the weight of evidence, and means the greater weight of the evidence in the judgment of the jury. In determining upon which side the preponderance of evidence is, the jury should take into consideration the opportunity of the several witnesses for seeing or ascertaining from their own personal knowledge the things about which they testify; their apparent intelligence or want of intelligence; their apparent capacity to observe accurately the things about which they have testified; their conduct and demeanor while testifying;
31 their apparent candor and frankness, or lack thereof; their interest or lack of interest, if any, in the result of the case; the relation or connection, if any, between the witnesses and the parties; the apparent fairness and consistency of their evidence; the probability or improbability of the truth of their several statements in view of all evidence, facts and circumstances proved on the trial. And the jury are further instructed that they are the exclusive judges of the weight of the evidence before them and the credit to be given the witnesses who have testified in the case.

The Court granted the second, third and fourth of said prayers, and refused to grant the first of said prayers; to which action of the Court in refusing to grant said first prayer the plaintiff then and there excepted.

The defendant thereupon requested the Court to grant the following instructions to the jury:

II.

The jury are instructed, as matter of law, that before the plaintiff can recover in this case they must find from a preponderance of the evidence that on the occasion in question there existed a step or rise extending across the aisle, near the entrance of the box D, towards the orchestra, that the existence of such step or rise was dangerous to persons upon said premises, and that the plaintiff fell or stumbled over said step or rise in said aisle and received the injuries complained of in these proceedings.

III.

The jury are instructed as matter of law, that if they find
32 from the evidence in this case that the defendant was guilty of negligence in maintaining a step or rise across the right-hand aisle of the ground floor of the theater premises of the defendant near the entrance to Box "D," or that the defendant was negligent in permitting the artificial lights to be extinguished before the plaintiff had an opportunity to leave the theater, yet if they further find from the evidence that the plaintiff walked or stepped backwards on said aisle toward the orchestra and was guilty of negligence

in so doing, and such negligence contributed to her injuries, then their verdict should be for the defendant.

The plaintiff objected to said prayers; but the Court overruled said objection and granted said prayers, and the same were read to the jury; and to the action of the Court in granting said prayers the plaintiff then and there excepted.

Thereupon, after counsel for the respective parties had addressed the jury, the Court charged the jury as follows:

GENTLEMEN OF THE JURY: It is as well for you to understand at the outset the responsibility and obligations that are upon the proprietor of a theater to promote the safety of his patrons. He is not held by the law to guarantee the safety of people who come into his establishment. The only duty that he owes them is to exercise that degree of care and foresight and caution in the preparation of his establishment and its floors and passageways that a man of reasonable prudence and caution would exercise if he was running a theater. That is the obligation that was upon the defendant
33 in this case; no more than that.

Understanding, then, what his duty was under the law with respect to providing for the safety of the plaintiff, attend for a moment to the claim of the plaintiff as to how she contends he violated that duty. She claims that he negligently suffered to exist in the main aisle and close enough to the entrance to the box aisle for her to step over it in emerging from the box aisle, a step. It is absolutely essential to the recovery by the plaintiff in this case that you should find it to be proven by the preponderance of the evidence that such a step was there in the main aisle, transverse of it, and close enough to be stepped over in emerging from the box aisle.

The reason of it is this: If Mr. Chase had met her at the door and had said: "Madam, there are three steps just in front of the aisle of the box in which your seat is; look out for them," and she had gone there and had fallen over those steps without looking out, nobody would say for a moment that that was his fault. She admits that she knew the three box aisle steps were there when she went in. Therefore she knew they were there when she came out; and if her fall was occasioned by her failure to observe the three box aisle steps, it is aside for her to complain that it was any fault of the defendant that occasioned such a fall as that, because that would have been her own fault in not taking care in passing over the steps which she knew were there. Therefore you see the necessity of proof upon behalf of the plaintiff of the existence of a step transverse of the main aisle. She says she did not know that such a step was
34 there, but that it was there. The burden is on the plaintiff to prove by a preponderance of the evidence that the step was there. If the proof fails in that regard you need not go further with the case. If you should conclude from the evidence that there was no step transverse of the main aisle and close enough to the entrance of the box aisle for her to step over and fall over in emerging from the box aisle, then you need go no further with the case, but render a verdict in favor of the defendant.

If, however, you do find that there was a step transverse of the main aisle in the locality that I have identified, that does not yet settle the question of the defendant's liability to the plaintiff. That liability depends on whether or not he was negligent in maintaining the step. Therefore if you should find the step existed, you would have to proceed to the determination of that further question whether or not the maintenance of a step at that place was negligence. That you will determine by the criterion which I have already suggested—that is, whether or not a man of reasonable prudence and caution, running that kind of a theater, would have had that step there. Even if it was negligence to maintain a step at that place, in determining whether or not the defendant is responsible for the injury sustained by the plaintiff through her fall you have to answer the first question, from the evidence, whether or not the negligence of the defendant, if it existed, was the proximate or first cause of the injury—that is to say, the fall. That would lead you to inquire into the conduct of the plaintiff herself; because if the defendant was negligent in maintaining the step at the point in
35 question, and the plaintiff failed to use that degree of care in emerging from the box aisle that a reasonable person would have used, she would also be negligent; and if they were both negligent, so that the negligence of both contributed to the injury, as a process of practical reasoning you could not say that one, as distinguished from the other, was at fault, and therefore the plaintiff could not recover.

In determining the question either of the negligence of the defendant or of the contributory negligence of the plaintiff, you will of course have to take into consideration the exact situation and condition that existed at the moment of the fall, which will lead you to inquire into the subject of whether or not at that moment the lights were on or off. One importance of that consideration is this: You might say that if the step was at the place in question it would not be negligence to maintain such a step if the lights were kept on, while perhaps you might say it would be negligence on the part of the defendant to maintain such a step at that place if the lights were turned off. In determining the question of negligence, whether it be applicable to the conduct of the plaintiff or of the defendant, either one, the criterion is the same. You ascertain from the evidence the situation of affairs as nearly as you can, and ask yourselves the question: would a person of reasonable prudence and caution have done this? If he would, there was no negligence. If not, there was negligence.

If you find ultimately in favor of the plaintiff (that is to say, if you find the defendant negligently maintained the step,
36 and that it was the negligent maintenance of the step under the conditions that existed at the time of the fall that directly occasioned the fall and the injury), then you will have to proceed to the consideration and determination of the question of the damages appropriate to be awarded to the plaintiff. She would be entitled to be fairly compensated for the pain, inconvenience and suffering that she has already endured as a direct result of the in-

jury. If you find it to be permanent (that is to say, such as would prevent her from pursuing her path through life as otherwise she would have been able to do), she would be entitled to such sum as in that regard would fairly compensate her. In addition to that, if entitled to recover at all she would be entitled to recover as an element of damage financial expenses or financial obligations not yet settled by her, to the extent that a person of reasonable prudence and judgment would have undertaken and engaged himself or herself in, in the effort to be cured.

The jury thereupon retired to consider their verdict, and returned a verdict for the defendant.

Be it also remembered that each of the separate and several exceptions taken by counsel for the plaintiff as hereinbefore set forth were so taken before the jury retired, and each of said exceptions so taken was then and there separately and severally duly entered upon the minutes of the justice presiding at the trial; and counsel for the plaintiff then and there prayed the Court and now prays the Court to sign this bill of exceptions, and the same is accordingly done, now for then, and made a part of the record of this case, on this 14th day of October, 1910.

DAN THEW WRIGHT, *Justice.*

(Endorsed:) Sub. July 22, 1910. W.

37 *Memorandum.*

Time to file Transcript of Record in Court of Appeals extended, from time to time, to November 1, 1910, inclusive.

Designation of Transcript of Record.

Filed October 15, 1910.

* * * * * * *

In making up the record in the above entitled cause the Clerk will please include:

June 22, 1906.—Memorandum: declaration filed.
Aug. 22. " Defendant's plea.
Sept. 4, " Joinder of issue.
July 19, 1907.—Order granting leave to file amended declaration and that plea to original declaration stand as to amended declaration.
July 19, 1907.—Amended declaration.
June 2, 1910.—Memorandum, verdict for defendant.
" 16, " Motion for new trial overruled and judgment.
June 20, " Memorandum of appeal by plaintiff.
" 20, " Citation with service accepted.
" 30, " Order fixing bond for costs or deposit in lieu.
July 6, " Memorandum: deposit in lieu of cost bond.

38 July 22, 1910.—Memorandum: Bill of exceptions submitted and time to file transcript of record extended to Sept. 15, 1910.

Sept. 2, 1910.—Order extending time to file transcript of record to October 15, 1910, inclusive.

Oct. 14, 1910.—Bill of exceptions and order making same part of record.

Oct. 14, 1910.—Order extending time to file record in Court of Appeals.

Oct. 15, 1910.—This designation.

H. W. SOHON,
Att'y for Plaintiff.

O. K.
W. J. LAMBERT,
For Def't.

39 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, do hereby certify the foregoing pages, numbered from 1 to 38, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made a part of this transcript, in cause No. 48,615, At Law, wherein Julia A. Ewing, is Plaintiff, and Plimpton B. Chase, is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe by name and affix the seal of said Court, at the city of Washington, in said District, this 28th day of October, A. D. 1910.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia Supreme Court. No. 2242. Julia A. Ewing, appellant, vs. Plimpton B. Chase. Court of Appeals, District of Columbia. Filed Oct. 29, 1910. Henry W. Hodges, clerk.